No. 21-8001

In the United States Court of Appeals for the District of Columbia Circuit

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IN RE EXXON MOBIL CORPORATION

ON PETITION FOR PERMISSION TO APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (CIV. NO. 20-1815) (THE HONORABLE TIMOTHY J. KELLY, J.)

RESPONDANT BEYOND PESTICIDES' OPPOSITION TO THE PETITION FOR PERMISSION TO APPEAL PURSUANT TO THE CLASS ACTION FAIRNESS ACT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Petitioner Exxon Mobil Corporation.

GLOSSARY OF ABBREVIATIONS

CAFA ..... Class Action Fairness Act of 2005

DCCPPA ..... D.C. Consumer Protection Procedures Act

ExxonMobil ..... Exxon Mobil Corporation

PtA ..... Petition to Appeal

MtS ..... Motion to Stay

SUMMARY OF THE ARGUMENT

On the direction of this Court's clerk, Plaintiff-Respondent Beyond Pesticides submits this consolidated response to Defendant-Petitioner ExxonMobil Corporation's Petition for Permission to Appeal Pursuant to the Class Action Fairness Act ("Petition to Appeal," or "PtA") and to ExxonMobil's Motion for an Emergency Stay of the Remand Order Pending Appeal ("Motion to Stay," or "MtS").

This Court has already denied three petitions for permission to appeal that were identical to ExxonMobil's Petition to Appeal, and nothing in the law has changed to warrant granting the petition here. This is a private-attorney-general action, brought by a D.C.-based non-profit, on behalf of the general public of the District of Columbia pursuant to the D.C. Consumer Protection Procedures Act ("DCCPPA"). Plaintiff-Respondent Beyond Pesticides, a public-interest organization, seeks no monetary relief or damages, only to enjoin certain, limited advertising by ExxonMobil directed at D.C. consumers. Every court to have considered the question has held that a DCCPPA private-attorney-general action for injunctive relief only—which according to the D.C. local courts requires no class certification and is not subject to FRCP 23 or to its state corollary, D.C. Superior Court Rule of Civil Procedure 23—falls within 28 U.S.C. § 1453(c) and therefore is exempt from CAFA jurisdiction. In 2009, and again in 2010, and again in 2013, this

Court declined to accept exactly the appeal that ExxonMobil seeks to bring, stating that it is for D.C. local courts to determine whether such an action must be litigated as a class action. Before those decisions, and since, a variety of DCCPPA private-attorney-general actions for injunctive relief have been brought within the District of Columbia courts ***not*** as class actions, and ***not*** subject to Rule 23—because the local courts do not consider these actions class actions.

Undeterred by this Court's previous rulings or by the actions of the District of Columbia courts, Defendant-Petitioner ExxonMobil contends that this action is different, based on the D.C. Court of Appeal's 2015 opinion in *Rotunda v. Marriott Int'l, Inc.*, 123 A.3d 980 (D.C. 2015). But the *Rotunda* decision is limited to actions seeking ***damages*** on behalf of consumers, as federal courts within this Circuit have recognized repeatedly; D.C. Superior Courts, since *Rotunda*, have continued to hear DCCPPA private-attorney-general actions for injunctive relief ***without*** subjecting them to Rule 23. ExxonMobil's reliance on a uniformly rejected *Rotunda* argument is nothing more than a Hail Mary to avoid this Court's prior rejections of the same appeal, and an effort to overrun the District of Columbia's right to determine the form of actions permissible under its own local laws.

As to federal diversity jurisdiction, the alternative ground that Defendant-Petitioner ExxonMobil unsuccessfully cited for removal, the United States Supreme Court is currently addressing whether the Court can consider alternative, non-

appealable grounds for federal jurisdiction at all. The weight of federal precedent nationwide suggests that this Court should ***not*** consider an appeal of diversity jurisdiction. If the Court does choose to consider diversity jurisdiction, it will see that every case to have considered the question—uniformly, no exceptions, more than 10 times—has decided ***against*** ExxonMobil's position. Those opinions hold that when a public-interest organization seeks, on behalf of the general public, to enjoin conduct directed at D.C. consumers, the cost of injunctive relief must be divided amongst the number of individuals affected by the ruling; to do otherwise violates the non-aggregation principle established in *Snyder v. Harris*, 394 U.S. 332, 335 (1969). No district court has wavered or expressed any confusion about this issue. ExxonMobil cannot succeed with this universally rejected argument for federal diversity jurisdiction.

Defendant-Petitioner ExxonMobil's Petition to Appeal, therefore, should be denied immediately. In the event that the Court does not act immediately to deny the petition, ExxonMobil's Emergency Motion to Stay should be denied. The only "emergency" here is ExxonMobil's displeasure that District of Columbia law requires ExxonMobil and other corporate defendants appear in Superior Court when the interests of the D.C. general public are at stake. ExxonMobil already filed an emergency motion to stay, followed by a motion to stay, in the district court, both of

which were summarily denied. As the district court held, twice, the balance of harms does not favor a stay here:

- Even if this Court chooses to hear ExxonMobil's appeal, no District of Columbia or federal precedent suggests that the appeal would succeed, or even that a serious legal question exists. To the contrary, D.C. and federal courts have consistently rejected ExxonMobil's arguments.

- The only purported injury to ExxonMobil's own interests is the possibility of litigation proceeding in Superior Court while ExxonMobil, of its own choice, pursues a baseless appeal (all the way to the United States Supreme Court, ExxonMobil has declared). That is not irreparable injury.

- By contrast, non-profit Plaintiff Beyond Pesticides, and the D.C. public, do face harm if a stay is granted. This action seeks injunctive relief against conduct aimed at D.C. consumers that is ongoing. ExxonMobil already has delayed the action a full year by removing without any support under the law, and every additional day allows its conduct to continue unfettered.

This Motion to Stay falls in line with ExxonMobil's continued efforts to bleed a public-interest organization dry to prevent it from ever making substantive arguments on behalf of the public. Plaintiff-Respondent Beyond Pesticides, on behalf of the D.C. general public, and seeking no relief of its own, therefore respectfully asks this Court to deny ExxonMobil's Petition for Permission to Appeal Pursuant to the Class Action Fairness Act, and in any event to deny ExxonMobil's Motion for an Emergency Stay of the Remand Order Pending Appeal, thus allowing Beyond Pesticides, at long last, to pursue an injunction against ExxonMobil's conduct targeting District of Columbia consumers.

QUESTIONS PRESENTED

1. Should this Court hear arguments to override the determination of the District of Columbia courts as to whether a private-attorney-general action seeking only injunctive relief pursuant to the D.C. Consumer Protection Procedures Act is a class action?

2. Should this Court hear arguments on a non-appealable alternative ground for removal, federal diversity jurisdiction?

3. Is a stay of proceedings warranted, where Defendant-Petitioner is unlikely to succeed on appeal, has not even identified a serious legal question, faces no irreparable injury from litigating in the D.C. Superior Court, and already has delayed the case for a year with an unfounded removal?

REASONS FOR DENYING THE PETITION TO APPEAL AND MOTION TO STAY

"Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002) (Rogers, J.) (denying interlocutory review of class certification). Permission to appeal is most likely to be granted when the district court's decision "turns on a novel or unsettled question of law, or [] as a practical matter, . . . is likely dispositive of the litigation." *Id.* None of those circumstances is present here. The district court's decision does not turn on a novel question of law; remand for lack of CAFA jurisdiction, under precisely these circumstances, has occurred repeatedly in the district court, and this Court has repeatedly denied permission to appeal those decisions. Nor is the question unsettled at this point; interpreting the guidance of the D.C. Court of Appeals, D.C. Superior Courts handle DCCPPA private-attorney-general actions for injunctive relief as ***not*** subject to Rule 23. Nor does Defendant-Petitioner ExxonMobil even attempt to argue that remand is dispositive of this litigation. To the contrary, Plaintiff-Respondent Beyond Pesticides requests denial of the Motion to Stay precisely so that the substantive litigation may ***begin*** in the proper forum, D.C. Superior Court.

I. District of Columbia Law Has Not Substantively Changed Since This Court Denied Three Previous Petitions for Permission to Appeal Identical to This One.

Plaintiff-Respondent Beyond Pesticides, in bringing this action, acts under D.C. Code § 28-3905(k)(1)(D). That provision, which works in conjunction with other parts of the DCCPPA, allows a public-interest organization to sue, on behalf of the interest of D.C. consumers generally, when misleading or untruthful information enters the D.C. marketplace, as follows—

- The DCCPPA "establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia." D.C. Code § 28-3901(c).
- A manufacturer misrepresenting the properties or qualities of consumer goods violates the DCCPPA regardless of "whether or not any consumer is in fact misled, deceived, or damaged thereby." D.C. Code § 28-3904.
- D.C. Code § 28-3905(k)(1)(A) states: "A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District."

The DCCPPA, therefore, grants D.C. consumers the right to a marketplace free from misleading statements, and the opportunity to bring an action seeking relief when that right is violated, *i.e.*, when untruth enters the marketplace. D.C. Code § 28-3905(k)(1)(D), in turn, allows a public-interest organization to represent consumers, and to bring any action that consumer could bring under (k)(1)(A):

> [A] public interest organization may, on behalf of the interests of a consumer or a class of consumers, bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District if the consumer or class could bring an action under

> subparagraph (A) of this paragraph for relief from such use by such person of such trade practice.

Pursuant to that section, Plaintiff-Respondent Beyond Pesticides, a non-profit public-interest organization, brings this action as a "private attorney general" on behalf of D.C. consumers.[1]

As set forth herein, the United States District Court has held, repeatedly, that an action of this sort does not require Rule 23 certification and is not to be treated like a class action, and D.C. Superior Courts do not treat this sort of action as a class action. Therefore, the action does not come under 28 U.S.C. § 1453(c) and is not subject to CAFA removal. This Court has denied permission to appeal this question, holding that D.C. courts own the determination of whether § 28-3905(k)(1)(D) private-attorney-general action for injunctive relief should be treated like a class action. Defendant-Petitioner ExxonMobil provides no credible reason to believe the outcome should be different here.

[1] The term "a consumer or class of consumers," as used in subsection 3905(k)(1)(D), does not refer to a Rule 23 class action—nor could it, insofar as a public-interest organization could not be "typical" of consumer purchasers for purposes of class certification. *See, e.g.*, *Julian Ford v. ChartOne, Inc.*, 908 A.2d 72, 86 (D.C. 2006) (quoting *Bynum v. Dist. of Columbia*, 214 F.R.D. 27, 34 (D.D.C. 2003), for proposition that typicality "focuses on whether the representatives of the class suffered a similar injury from the same course of conduct").

A. This Court Has Previously Denied Permission to Appeal Precisely the Remand Question at Issue Here, Holding That Interpretation of the DCCPPA Belongs to the Local Courts.

If Defendant-Petitioner Exxon-Mobil's Petition to Appeal looks familiar, it is because this Court has three times denied identical petitions. In *Nat'l Consumers League v. General Mills, Inc.*, 680 F. Supp. 2d 132 (D.D.C. 2010), a plaintiff public-interest organization (National Consumers League ("NCL")) brought a DCCPPA private-attorney-general action seeking to enjoin defendant General Mills' representation that Cheerios cereal had "drug-quality properties that would reduce total and 'bad' cholesterol levels when eaten." *Id.* at 134 (quoting complaint ("Compl.")). General Mills removed the action, citing CAFA jurisdiction. As in the instant action, the district court held that a DCCPPA private attorney general action for injunction falls within the exception of 28 U.S.C. § 1332(d)(11)(B)(ii)(III) and therefore, is not covered by CAFA: "NCL's suit falls squarely under this exception: it is a civil action in which the sole claim is asserted on behalf of the general public pursuant to a D.C. Code provision that specifically authorizes such action. As such, it is not a mass action removable under CAFA." *NCL*, 680 F. Supp.2d at 137.

General Mills petitioned this Court for permission to appeal under 28 U.S.C. § 1453(c)(1). In a terse, *per curiam* opinion, the Court denied permission to appeal: "It is unclear as a matter of District of Columbia law whether respondent's D.C. Consumer Protection Procedures Act 'private attorney general' action must be

litigated as a class action under Rule 23. Accordingly, the District of Columbia courts should determine how this action should proceed." *In re General Mills, Inc.*, No. 10-8001, 2010 U.S. App. LEXIS 13195, at *1 (D.C. Cir. June 25, 2010) (per curiam) ("*General Mills*"). The *General Mills* denial of petition cites *In re U-Haul Int'l, Inc.*, No. 08-7122, 2009 U.S. App. LEXIS 7163 (D.C. Cir. April 6, 2009) (per curiam) ("U-Haul"), a virtually identical ruling issued one year earlier:

> U-Haul International, Inc. argues that a 'private attorneys general action' brought under the D.C. Consumer Protection Procedures Act must be litigated as a class action under Rule 23. This is not clear as a matter of District of Columbia law, and the local courts should determine how this action, purported to be a non-class representative action, should proceed.

Id. at **1-2. Subsequent to *General Mills*, this Court again denied permission to appeal the same issue, in *Monster Beverage Corp. v. Zuckman*, No. 13-8006 (D.C. Cir. Dec. 16, 2013) (per curiam) ("*Monster Beverage*") (order attached hereto as Ex. A). Each time, the Court asserted that the D.C. courts should determine whether a private-attorney-general DCCPPA action for injunction is a class action.

B. The D.C. Court of Appeals' Decision in *Rotunda* Does Not Apply to Actions for Injunctive Relief Only.

Defendant-Petitioner ExxonMobil does not deny that the Court has repeatedly denied permission to appeal this question, or the Court's reason for doing so, *i.e.*, that the local courts should interpret this local law. Instead, ExxonMobil puts forth an overly expansive and uniformly rejected reading of *Rotunda v. Marriott Int'l,*

Inc., 123 A.3d 980 (D.C. 2015), and pretends that the local courts have said something that they have not.

The *Rotunda* plaintiff, an individual D.C. resident, challenged Marriott International's practice of quoting prices for rooms in its Russian hotels in U.S. dollars, but then charging payment in Russian rubles calculated at an unfavorable exchange rate. The plaintiff sought to represent all residents of the District of Columbia who had been victimized by this practice in Russia, and to recover money damages on their behalf. He sought to proceed under D.C. Code § 28-3905(k)(1)(B) (which is not the standing provision under which Plaintiff-Respondent Beyond Pesticides acts here)[2] but expressly disclaimed any intention to follow Rule 23 procedures for certification of a damages class. The District of Columbia Court of Appeals affirmed the Superior Court's dismissal of the "representative" portion of the complaint, holding that § 3905(k)(1)(B) was not meant to "supplant with *ad hoc* procedures the framework long established by Rule 23" for such a representative action. Defendant-Petitioner ExxonMobil selectively quotes from *Rotunda* to suggest that the decision did not turn on the nature of the underlying suit. (PtA 14.)

[2] D.C. Code § 3905(k)(1)(B) provides: "An individual may, on behalf of that individual, or on behalf of both the individual and the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District when that trade practice involves consumer goods or services that the individual purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes."

This is not a realistic reading. This, verbatim, is how the *Rotunda* opinion concludes: "In sum, the unique challenges to procedural fairness and administration posed by a ***representative suit for damages*** require certainty, in our view, that the legislature has taken them into account before displacing the framework that has governed such suits for decades in the Superior Court." *Rotunda*, 123 A.3d at 989 (emphasis added).

To the knowledge of Plaintiff-Respondent Beyond Pesticides, no court, ever, federal or state, has held that the *Rotunda* decision applies to a non-profit's private-attorney-general action for injunctive relief only. To the contrary, as set forth below (*infra*, Part I.D), there is no confusion or split over this issue: All the decisions hold that *Rotunda* does not mean such an action should be treated like a class action or made subject to CAFA jurisdiction. *Cf. Hunter v. Ark Rests. Corp.*, 3 F. Supp. 2d 9, 16 (D.D.C. 1998) ("[A federal court] is not free to impose [its] own view of what state law should be; rather, [it is] to apply existing state law as interpreted by the state's highest court in an effort to predict how that court would decide the precise legal issues before [the federal court]." (quoting *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1444 (3d Cir. 1996))).

C. District of Columbia Courts Do Not Treat DCCPPA Private-Attorney-General Actions for Injunctive Relief as Class Actions.

Defendant-Petitioner ExxonMobil asks this Court to consider supplanting the interpretation of D.C. courts regarding a D.C. law. Following *Rotunda*, one D.C. Superior Court opinion pondered whether "because they are seeking only equitable

remedies," the two public-interest plaintiffs could "pursue this representational lawsuit without obtaining class certification," but held that the question had no bearing on denying a motion to dismiss. *Organic Consumers Ass'n v. General Mills, Inc.*, No. 2016 CA 6309 B, 2017 D.C. Super. LEXIS 4, at *12 (July 6, 2017) (citing *Animal Legal Def. Fund v. Hormel Foods Corp.*, 249 F. Supp. 3d 53, 64-65 (D.D.C. 2017) ("*Hormel Foods*")). Since then, however, District of Columbia courts have heard motions to dismiss on standing in numerous DCCPPA actions seeking injunctive relief only, and not once has a court indicated that the plaintiff must satisfy Rule 23, or that the non-profit plaintiff must act as a class representative. *See, e.g.*, *Organic Consumers Ass'n v. Tyson Foods, Inc.*, No. 2019 CA 004547 B, 2021 D.C. Super. LEXIS 7, *7 (Mar. 31, 2021) ("plaintiff sufficiently alleges an injury to those consumers who have been or will be deceived by defendant's alleged deceptive marketing and advertising"); *Organic Consumers Ass'n v. D'Artagnan, Inc.*, No. 2020 CA 3559 B, 2021 D.C. Super. LEXIS 4, at *6 (Feb. 1, 2021) (finding that nonprofit organization had standing to bring a suit on behalf of the general public); *Organic Consumers Ass'n v. Smithfield Foods, Inc.*, No. 2020 CA 2566 B, 2020 D.C. Super. LEXIS 28, at *10 (Dec. 14, 2020) ("[J]udges of the D.C. Superior Court have repeatedly [held] that non-profit groups that bring consumer-protection actions under the CPPA have standing to bring such claims on behalf of consumers and the general public."); *Organic Consumers Ass'n v. Noble Foods, Inc.*, No. 2020 CA

002009 B, 2020 D.C. Super. LEXIS 24, at *4 (Nov. 12, 2020) (declining to certify question for appellate review where "this Court has repeatedly held that organizations similar to [plaintiff] have standing under the CPPA to bring similar claims"); *Children's Health Def. v. Beech-Nut Nutrition Co.*, No. 2019 CA 004475 B, 2020 D.C. Super. LEXIS 3, at **5-6 (Apr. 8, 2020) (collecting cases); *Toxin Free USA v. J.M. Smucker Co.*, No. 2019 CA 3192 B, 2019 D.C. Super. LEXIS 15, at *7 (Nov. 6, 2019) (rejecting defendant's argument that § 28-3905(k)(1)(D) did not afford non-private plaintiff right to sue for injunction in Superior Court); *Organic Consumers Ass'n v. Pret A Manger (USA) Ltd.*, No. 2018 CA 006750 B, 2019 D.C. Super. LEXIS 5, at *11 (Apr. 29, 2019) (entering comprehensive scheduling order lacking any class certification procedures); *Clean Label Project Found. v. Panera*, No. 2019 CA 001898 B, 2019 D.C. Super. LEXIS 14, at **7-8 (Oct. 11, 2019) (finding that public-interest organization enjoys (k)(1)(D) right to sue as private attorney general on behalf of D.C. consumers); *Organic Consumers Ass'n v. Bigelow Tea Co.*, No. 2017 CA 008375 B, 2018 D.C. Super. LEXIS 11, at **1, 5 (Oct. 31, 2018) (allowing "a non-profit public interest organization based in Minnesota and acting for the benefit of the general public" to proceed on private-attorney-general basis); *Nat'l Consumers League v. Gerber Prods. Co.*, No. 2014 CA 008202 B, 2018 D.C. Super. LEXIS 1, at *4 (Feb. 21,

2018) (rejecting argument that statutory injury was not tied to injunctive relief sought).[3]

"Superior Court judges presumably have as much expertise as would a state court judge in deciding questions of state law. This is one reason that we defer to the local courts' interpretations of the D.C. Code in the same manner that other federal courts defer to state court interpretations of state law." *Handy v Shaw, Bransford, Veilleux & Roth*, 325 F.3d 346, 352 (D.C. Cir. 2003) (Henderson, J.) (citing *United States v. Edmond*, 924 F.2d 261, 264 (D.C. Cir. 1991) (Randolph, J.)). It is clear that District of Columbia courts do not read *Rotunda* to make a DCCPPA private-attorney-general action for injunctive relief into a class action. Defendant-Petitioner ExxonMobil seeks an appeal so that it can urge this Court to determine how D.C. Superior Court should be interpreting a decision of the D.C. Court of Appeals, and indeed to override the manner in which the Superior Court has done so to date. As it recognized in *U-Haul*, *General Mills*, and *Monster Beverage*, the Court should not hear such an appeal:

[3] Ironically, even if CAFA did allow for removal of this DCCPPA private-attorney-general action, CAFA's requirements could not be met. First, where no class has been proposed, identified, or certified—where not even a class period has been suggested—ExxonMobil could not possibly demonstrate that the proposed class consists of 100 or more people. *See* 28 U.S.C. § 1332(d)(2). Second, ExxonMobil did not produce competent evidence in the district court establishing that it would cost more than $5 million to cease certain advertising within the District of Columbia. *See* 28 U.S.C. § 1332(d)(5)(B).

> The most important consideration guiding the exercise of this discretion [certifying questions of law on appeal] is whether the reviewing court finds itself genuinely uncertain about a question of state law that is vital to a correct disposition of the case before it. [collecting cases] Where the applicable state law is clear, certification is inappropriate; it is not a procedure by which federal courts may abdicate their responsibility to decide a legal issue when the relevant sources of state law available to it provide a discernible path for the court to follow.

Tidler v Eli Lilly & Co., 851 F.2d 418, 426 (D.C. Cir. 1988) (Ginsburg, J.). The interpretation of the DCCPPA belongs, first, to D.C. courts, which do not agree with ExxonMobil's position. *Cf. Metz v. Bae Sys. Tech. Solutions & Servs.*, 774 F.3d 18, 23-24 (D.C. Cir. 2014) (Garland, J.) ("[Appellant's] certification request is thus based merely upon the 'possibility that the D.C. Court of Appeals might adopt [an] exception[] to its general rule'—a ground we have held insufficient to warrant certification.") (citing *Rollins v. Wackenhut Servs.*, 703 F.3d 122, 129 (D.C. Cir. 2012) (Rogers, J.)).

D. There Is No Split in Authority, No Question That Needs to Be Answered Within This Circuit.

ExxonMobil concedes that "district judges have issued numerous decisions addressing whether such actions qualify as 'class actions'." (PtA 8 (citing cases).) What ExxonMobil does not mention, however, is that no federal court, ever, has found that a DCCPPA private-attorney-general action for injunctive relief ***does*** qualify as a class action. Every single decision, including those rendered after the *Rotunda* opinion, has found against ExxonMobil's position, for example:

- *Toxin Free USA v. J.M. Smucker Co.*, No. 20-cv-1013, 2020 U.S. Dist. LEXIS 222520, at **7-8 (D.D.C. Nov. 30, 2020) ("*Rachael Ray Nutrish*"), which held that "the *Rotunda* court's concern—that not requiring compliance with *Rule 23* would preclude members of the public from asserting their own claims for damages, *see Rotunda*, 123 A.3d at 986—does not apply here . . . because Toxin Free seeks injunctive relief and not damages on behalf of the general public";

- *Hormel Foods*, *supra*, 249 F. Supp. 3d at 64, which held, "The Court need not resolve the parties' dispute on this issue [regarding the amount in controversy], however, because class action jurisdiction under CAFA is absent here for a much more fundamental reason: Plaintiff has not brought this case as a class action";

- *Hackman v. One Brands, LLC*, No. 18-2101, 2019 U.S. Dist. LEXIS 55635, at **8-10 (D.D.C. Apr. 1, 2019), which held that *Rotunda* is inapplicable where "Plaintiff seeks only injunctive relief on behalf of members of the general public";

- *Smith v. Abbott Labs., Inc.*, No. 16-501 (RJL), 2017 U.S. Dist. LEXIS 135478, at **4-5 (D.D.C. Mar. 31, 2017) ("*Abbott Labs*"), which held that *Rotunda*'s reach is limited "solely to suits for money damages."

Those post-*Rotunda* decisions mirror the opinions that preceded *Rotunda* and also held that a CPPA private-attorney-general action for injunctive relief is not a class action. *See, e.g.*, *Nat'l Consumers League v. Bimbo Bakeries USA*, 46 F. Supp. 3d 64, 76-77 (D.D.C. 2014) ("Because of the conspicuous lack of class certification requirements in the statute, the precedent holding that private attorney general actions are not class actions, and the public policy reasons discussed in footnote 5, *supra*, the Court concludes that this case is not removable as a class action under CAFA."); *Nat'l Consumers League v. Flowers Bakeries, LLC*, 36 F. Supp. 3d 26, 36 (D.D.C. 2014) ("The Court therefore sees no reason to depart from the well-reasoned

conclusion . . . that removal is not permitted under CAFA's class action provision for actions brought by a private attorney general under D.C. Code § 28-3905(k)(1) where plaintiff has not brought a 'class action' under D.C. Superior Court Rule 23."); *Margolis v. U-Haul*, No. 2007 CA 005245 B, 2009 D.C. Super. LEXIS 8, at *25 (Dec. 17, 2009) (holding that "Rule 23 of the Superior Court Rules of Civil Procedure is applicable to claims for money damages brought under the CPPA on behalf of third parties").

Accordingly, there is no split among district court opinions in this Circuit; no district court has expressed uncertainty over the issue, or that guidance is needed on the question. *See, e.g.*, *Harrington v. Sessions (In re Brewer)*, 863 F.3d 861, 874-75 (D.C. Cir. 2017) (Ginsburg, J.) (denying interlocutory review of class certification where there was no "unsettled and fundamental issue of law": "[Petitioner's] transformation of 'familiar and almost routine issues,' into purportedly 'fundamental' issues of law is no more successful than other alchemical efforts'" (quoting *Lorazepam*, 289 F.3d at 103)); *In re Buccina*, 657 Fed. Appx. 350, 352 (6th Cir. 2016) (denying petition for interlocutory appeal where "there is no difference of opinion in this Circuit, nor is there any circuit split "'on a question that our own circuit has not answered'" (quoting *In re Miedzianowski*, 735 F.3d 383, 384 (6th Cir. 2013)); *In re Morgan & Pottinger, P.S.C.*, No. 10-0309, 2010 U.S. App. LEXIS 27015, at *2 (6th Cir. June 16, 2010) (denying petition to appeal under 28 U.S.C. §

1453(c) where district court's ruling was "consistent with the body of law" in same and other circuits); *Azima v. RAK Inv. Auth.*, 325 F. Supp. 3d 30, 38 (D.D.C. 2018) (refusing to certify *forum non conveniens* order for interlocutory appeal: "In short, because RAKIA's certification motion provides no evidence of a circuit split, conflicting decisions among the judges in this district amidst a dearth of case law from the D.C. Circuit, or anything other than an attempt to revisit the previous, unsuccessful arguments that RAKIA has made . . . , there exists no substantial ground for a difference of opinion, and this Court cannot certify RAKIA's motion.").[4] Simply put, there is no reason for appeal other than ExxonMobil's dissatisfaction with the precedent. *See, e.g.*, *United States v. Farhad*, 190 F.3d 1097, 1101 (9th Cir 1999) ("[W]e are compelled by the overwhelming weight of these precedents to apply the law as it currently exists, and not as [petitioner] might have it.").

[4] *Cf. Lee v. Lampert*, 610 F.3d 1125, 1134 (9th Cir. 2010) ("We now resolve this question for our circuit for two reasons. First, there is a widening split among the district courts of our circuit . . . . This split creates troubling inconsistency."), *superceded on other grounds by Lee v. Lampert*, 653 F.3d 929 (9th Cir. 2011) (en banc); *Barbour v. Int'l Union*, 594 F.3d 315, 321 (4th Cir. 2010) ("in consideration of the split among the district courts in this circuit, we accept the district court's invitation in this case to clarify the law in this circuit"); *In re Steinhardt P'ners, L.P.*, 9 F.3d 230, 233 (2d Cir. 1993) (issuing writ of mandamus to review district court order in light of split among district courts in circuit, and among other circuits).

II. This Court Should Not Hear an Appeal of Diversity Jurisdiction.

If the petition for permission to appeal the CAFA decision is denied, there is no question of the Court reaching the question of diversity jurisdiction, because that is not independently appealable. But even if the petition for permission to appeal the CAFA decision is granted, review of diversity jurisdiction question would be inappropriate.

A. Precedent Suggests That Federal Diversity Jurisdiction Is Non-Appealable, Even as an Alternative Ground to CAFA Jurisdiction.

Defendant-Petitioner ExxonMobil also seeks permission to appeal the district court's holding that no federal diversity jurisdiction exists here. Section 1447(d),[5] United States Code 28, precludes review of a remand decision premised solely on lack of diversity jurisdiction. The weight of authority holds that 28 U.S.C. § 1447(d) also precludes appellate review of any ground for federal jurisdiction other than those appealable by statute, such as the CAFA provision of 28 U.S.C. § 1453(c)(1)—which means the Court should not consider reviewing the portion of the district court's decision that rejected ExxonMobil's diversity-jurisdiction argument. *See, e.g.*, *Bd. of County Commrs. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 819 (10th

[5] "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title [28 USCS § 1442 or 1443] shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d).

Cir. 2020) (to which ExxonMobil was also party); *City of San Mateo v. Chevron Corp.*, 960 F.3d 586, 597 (9th Cir. 2020) (to which ExxonMobil was also party); *Wilmington Sav. Fund Soc'y, FSB v. Velardi*, 803 F. App'x 572, 573 (3d Cir. 2020); *Dixit v. Dixit*, 769 F. App'x 879, 880 (11th Cir. 2019); *City of Walker v. Louisiana*, 877 F.3d 563, 566 n.2, 567 n.4 (5th Cir. 2017); *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012).

ExxonMobil, in its Petition to Appeal, does not mention that the United States Supreme Court is currently considering this issue, *i.e.*, whether other grounds for remand can be reviewed when only one of the grounds is appealable, in *BP P.L.C. v. Mayor & City Council of Baltimore*, No. 19-1189. ExxonMobil is party to that appeal, represented by the same attorneys as here. In *BP P.L.C.*, ExxonMobil and the other defendants (now petitioners) sought certiorari after the Fourth Circuit ruled against them and held, in accordance with the precedent cited above, that alternative grounds for remand were ***not*** reviewable. *See Mayor of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020). The issue does not appear to have been considered yet by this Court. Plaintiff-Respondent Beyond Pesticides respectfully suggests that, as set forth below (*infra*, Part II.B), this is not a case where the Court should forge ahead of the Supreme Court's decision, because ExxonMobil's argument for diversity jurisdiction is not colorable in any event.

B. Even If Federal Diversity Jurisdiction Were Appealable, This Court Should Not Exercise Discretion to Hear the Question.

The relief requested by Plaintiff-Respondent Beyond Pesticides, in its Complaint, is that the D.C. Superior Court declare that a portion of ExxonMobil's advertising directed at D.C. consumers violates the DCCPPA (specifically D.C. Code § 28-3904(a), (d), (e), (f), (f-1), and (h)) and enjoin any advertising found to be in violation. (Compl. ¶ 144, Prayer.) According to ExxonMobil, this relief will cost more than $75,000 and, therefore, federal diversity jurisdiction exists pursuant to 28 U.S. Code § 1332. The problem with ExxonMobil's argument is that in a public-interest DCCPPA case seeking only declaratory and injunctive relief, the non-aggregation principle of *Snyder*, 394 U.S. at 335, and *Zahn v. Int'l Paper Corp.*, 414 U.S. 291 (1973), dictates that the cost of compliance must be calculated on a per-affected-individual basis.[6] That is, in order to establish federal diversity jurisdiction, ExxonMobil would need to establish that the $75,000 jurisdictional

[6] *See also, e.g.*, *Lovell v. State Farm Mut. Auto. Ins. Co.*, 466 F.3d 893, 898 (10th Cir. 2006) ("[T]he cost running to each plaintiff must meet the amount in controversy requirement."); *McCauley v. Ford Motor Co.*, 264 F.3d 952, 960-61 (9th Cir. 2001) (holding that "the amount in controversy requirement cannot be satisfied by showing that the fixed administrative costs of compliance exceed $75,000," which would be "fundamentally violative of the principle underlying the jurisdictional amount requirement—to keep small diversity suits out of federal court"); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997) ("'Whatever the form of relief sought, each plaintiff's claim must be held separate from each other plaintiff's claim from both the plaintiff's and the defendant's standpoint.' As such, the relevant calculation is 'the cost to each defendant of an injunction running in favor of one plaintiff'.").

minimum, *see* 28 U.S.C. § 1332(a), is met for ***each*** member of the D.C. general public who would benefit from Beyond Pesticides' requested injunctive relief. *Cf. Fenster v. Schneider*, 636 F.2d 765, 767 (D.C. Cir. 1980) (Wald, J.) (collecting precedent holding that "cost-to-defendant rule for computing jurisdictional amounts" violated the *Zahn* rule against aggregation of claims).

Defendant-Petitioner ExxonMobil did not attempt to make any such showing to the district court. Instead, ExxonMobil contended (as it did with CAFA jurisdiction) that every single opinion on the topic within this Circuit has been wrongly decided.[7] Those opinions include, at least:

- *Rachael Ray Nutrish*, *supra*, 2020 U.S. Dist. LEXIS 222520, at **10-11;
- *Food & Water Watch, Inc. v. Tyson Foods, Inc.*, No. 19-cv-2811, 2020 U.S. Dist. LEXIS 38232, at **15-16 (D.D.C. Mar. 5, 2020);
- *Hackman*, *supra*, 2019 U.S. Dist. LEXIS 55635, at *18;
- *Institute for Truth in Mktg. v. Total Health Network Corp.*, 321 F. Supp. 3d 76, 91 (D.D.C. 2018);

[7] Defendant-Petitioner ExxonMobil is simply wrong to accuse the district court, in all these decisions, of "declin[ing] to follow this Court's precedent." (PtA 21.) The district court opinions have consistently recognized that the absence of "binding precedent on this issue" from this Court, *Hormel Foods*, 249 F. Supp.3d at 60, and that "[t]he D.C. Circuit has not ruled on the proper method for calculating a defendant's injunction costs in representative suits such as this one," *Breathe DC v. Santa Fe Nat. Tobacco Co.*, 232 F. Supp.3d 163, 170 (D.D.C. 2017). Instead, based on decisions like *Fenster*, 636 F.2d at 767, and precedent from other Circuit Courts, the district court has agreed that ExxonMobil's proposed method of sliding into federal court violates *Snyder* and *Zahn*.

- *Organic Consumers Ass'n v. R.C. Bigelow, Inc*., 314 F. Supp.3d 344, 350 (D.D.C. 2018);
- *Hormel Foods*, *supra*, 249 F. Supp.3d at 59;
- *Abbott Labs., supra*, 2017 U.S. Dist. LEXIS 135478, at *4;
- *Breathe DC*, 232 F. Supp.3d at 170;
- *Organic Consumers Ass'n v. Handsome Brook Farm Grp. 2*, LLC, 222 F. Supp. 3d 74, 78-79 (D.D.C. 2016);
- *Witte v. General Nutrition Corp.*, 104 F. Supp.3d 1, 6 (D.D.C. 2015); and
- *Breakman v. AOL LLC*, 545 F. Supp.2d 96, 105 (D.D.C. 2008).

As with Defendant-Petitioner ExxonMobil's CAFA argument, there is no split among district court opinions in this Circuit, no light between the uniform decisions.[8] Even if this Court were to grant permission for the CAFA appeal, there would be no reason for this Court to determine that it can consider the non-appealable diversity-jurisdiction argument—against the weight of federal precedent and ahead of the Supreme Court's decision in *BP P.L.C.*—in order to answer a question that no district court is asking. *See supra*, Part I.B.

[8] Defendant-Petitioner ExxonMobil attempts to make it appear that the district court decision in *Williams v. Purdue Pharma Co.*, No. 02-0556, 2003 U.S. Dist. LEXIS 19268 (D.D.C. Feb. 27, 2003), found otherwise. (PtA 20.) Not so. *Williams* involved both a class action and monetary damages, *i.e.*, a putative class action of individual consumers seeking damages arising from the purchase or receipt of pain medication.

III. The Motion to Stay Should Be Denied.

Permission to appeal should be denied, as set forth above, which will render the motion for a stay moot. But even if the Court were inclined to hear the appeal, no stay should be granted. Granting a stay pending appeal is "always an extraordinary remedy" and the moving party carries a heavy burden to demonstrate that the stay is warranted. *B'hood of Rwy. & Steamship Clerks, Freight Handlers & Station Emps. v. Nat'l Mediation Bd.*, 374 F.2d 269, 275 (D.C. Cir. 1966) (per curiam); *see also Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam). The party seeking a stay must (1) make a strong showing that it is likely to prevail on the merits of the appeal; (2) show that without such relief, it will be irreparably injured; (3) demonstrate that the issuance of a stay will not substantially harm other parties interested in the proceedings; and (4) show where the public interest lies. *See Wash. Met. Area Transit Com. v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977) (Leventhal, J.) (citing *Va. Petro. Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam)). Without showing either a likelihood of success on appeal or irreparable injury, Defendant-Petitioner ExxonMobil fails to carry that heavy burden—a conclusion only strengthened by the harm to the non-profit Plaintiff-Respondent and the D.C. public if this litigation is further delayed.

A. The Court Already Held That the Determination of These Issues Belongs With D.C. Courts, Leaving ExxonMobil With No Likelihood of Success on Appeal.

A stay pending appeal is unwarranted unless Defendant-Petitioner Exxon Mobil makes "a strong showing that it is likely to prevail on the merits of the appeal." *Wash. Met. Area Transit*, 559 F.2d at 842; *see also, e.g.*, *Citizens for Responsibility & Ethics v. FEC*, 904 F.3d 1014, 1019 (D.C. Cir. 2018) (per curiam) ("Crossroads' appeal shows little prospect of success—an arguably fatal flaw for a stay application." (citing *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014) (Tatel, J.))). If the balance of hardships were to "tip[] decidedly toward" injury to ExxonMobil, it would suffice for ExxonMobil to demonstrate "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Wash. Met. Area Transit*, 559 F.2d at 844-45 (citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)).[9] As set forth below, the balance of hardships does not

[9] Examples of "serious legal questions" were found in the district court's decision last year in *Philipp v. F.R.G.*, 436 F. Supp. 3d 61 (D.D.C. 2020), where "the issues presented in connection with this case raise serious and important legal questions regarding application of the expropriation exception and the comity doctrine, where these questions have yet to be resolved by the Supreme Court, and they can affect relations between the United States and foreign nations." *Id.* at 67 (citing Supreme Court precedent holding that these questions were especially sensitive, this Circuit's own prior holding that this was a close question subject to a circuit split, and the fact that official position of the United States supported movant's position); *see also, e.g.*, *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 13 (D.D.C. 2014) ("the

tip decidedly, or at all, toward ExxonMobil; it is Plaintiff-Respondent Beyond Pesticides and the D.C. general public who will be harmed if this action is further delayed. The correct standard is "a strong showing that [ExxonMobil] is likely to prevail on the merits of the appeal"—but that is almost irrelevant, because ExxonMobil has not shown even a serious legal question, or that permission to appeal should be granted in the first instance.

In its Order denying ExxonMobil's second motion for stay pending appeal, the district court wrote that ExxonMobil had not carried its burden, in the face of "overwhelming[] reject[ion]" of its position:

> Defendant is unlikely to prevail on the merits of the appeal. As this Court has already explained, courts in this District have overwhelmingly rejected Defendant's interpretation of *Rotunda*. *See, e.g.*, *Toxin Free USA v. J.M. Smucker Co.*, No. 20-cv-1013 (DLF), 2020 U.S. Dist. LEXIS 222520, at *7-8 (D.D.C. Nov. 30, 2020); *Hackman v. One Brands, LLC*, No. 18-2101 (CKK), 2019 U.S. Dist. LEXIS 55635, at *8-10 (D.D.C. Apr. 1, 2019); *Smith v. Abbot Labs., Inc.*, No. 16-501 (RJL), 2017 U.S. Dist. LEXIS 135478, at *4-5 (D.D.C. Mar. 31, 2017); *Animal Legal Def. Fund v. Hormel Foods Corp.*, 249 F. Supp. 3d 53, 64-65 (D.D.C. 2017).

(4/6/21 Minute Order.) The district court was correct: As demonstrated *supra*, Part I, Defendant-Petitioner ExxonMobil points to no shred of support for its interpretation of *Rotunda*, neither in the federal courts nor in the local courts. To the

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case presented difficult and substantial legal questions regarding the balance between federal and state regulation of Indian land, and [the] decision was at times, a close one").

contrary, D.C. Superior Courts do not treat these private-attorney-general actions for injunctive relief as class actions. No matter which standard is applied, ExxonMobil has failed to carry its burden, when its entire argument consists of asserting (1) that every previous decision to consider CAFA jurisdiction in this context was wrongly decided, and (2) that this Court should override the D.C. Superior Courts' own practices following *Rotunda*. *See, e.g.*, *Comm. on the Judiciary v. Miers*, 575 F. Supp. 2d 201, 204 (D.D.C. 2008) (finding that movant failed to "demonstrate that it has a substantial likelihood of success on appeal, or even that a serious legal question is presented" where its position was "entirely unsupported by existing case law"); *Shays v. Fec*, 340 F. Supp. 2d 39, 46 (D.D.C. 2004) (finding no "serious legal question" where movant "has merely presented the Court with arguments that contradict time-honored precedent and run afoul of well-established jurisprudential tests"); *Am. Cetacean Soc'y v. Baldridge*, 604 F. Supp. 1411, 1414 (D.D.C. 1985) (finding no "serious legal question" where precedent was "overwhelmingly against" movant's position, and where movant's "position flies in the face of years of consistent agency interpretation").

B. ExxonMobil Will Not Face Irreparable Injury Absent a Stay.

Stay pending appeal is "not a matter of right, even if irreparable injury might otherwise result" to the movant. *Nken v. Holder*, 556 U.S. 418, 427 (2009). Where Defendant-Petitioner ExxonMobil fails to show the likelihood of irreparable injury,

unquestionably no stay is warranted. ExxonMobil's only argument regarding irreparable injury is that, absent a stay, "Defendants [*sic*] would then simultaneously have to brief and argue federal jurisdictional issues in the D.C. Circuit while litigating Beyond Pesticides' claims in D.C. Superior Court." (MtS 16.)[10] ExxonMobil concedes that "litigation costs generally do not constitute irreparable injury" (MtS 17 (citing *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974))—but then argues that this case is different because ExxonMobil plans to file "a special motion to dismiss under the D.C. Anti-Strategic Lawsuits Against Public Participation Act of 2010," and "[i]f the remand order is reversed . . . ExxonMobil's effort would be wasted, because this Court has held that the statute does not apply in federal court." (MtS 17-18.)

This argument holds no weight whatsoever. First, litigation costs are litigation costs; there is no special rule that filing a state-law motion (by ExxonMobil's own choice) would create "irreparable injury." *See, e.g.*, *Pan Am Flight 73 Liaison Group v. Dave*, 711 F. Supp. 2d 13, 35 (D.D.C. 2010) (rejecting argument for exception to principle that litigation costs do not generally constitute irreparable injury and holding that special arbitration costs "are still just litigation costs, and therefore

[10] This portion of Defendant-Petitioner ExxonMobil's Motion to Stay (MtS 16-17) appears to have been taken from briefing in another case, as it makes repeated references to "defendants"—ExxonMobil is the only defendant named by Plaintiff-Appellant Beyond Pesticides—and cites law from Oklahoma, North Carolina, Florida, and Hawaii, but nothing from within this Circuit.

cannot constitute irreparable harm"); *McGinn, Smith & Co. v. Fin. Indus. Regulatory Auth.*, 786 F. Supp. 2d 139, 147 (D.D.C. 2011) (denying Plaintiff's contention that having to proceed with FINRA hearing would cause irreparable harm because "courts have uniformly recognized that '[m]ere litigation expense . . . does not constitute irreparable injury'")(quoting *Renegotiation Bd.*, 415 U.S. at 24); *Thorp v. District of Columbia*, 317 F. Supp. 3d 74, 88 (D.D.C. 2018) (holding that complying with or contesting a demand for financial records does not constitute irreparable harm because, "[m]uch like taxes, the 'annoyance of litigation is part of the social burden of living under government'")(citing *John Doe Co. v. Consumer Fin. Protection Bur.*, 235 F. Supp. 3d 194, 203 (D.D.C. 2017)); *Sterling Commer. Credit—Michigan, LLC v. Phoenix Indus. I, LLC*, 762 F. Supp. 2d 8, 17 (D.D.C. 2011) (finding no irreparable harm where "Plaintiff has not cited any case holding that a movant established irreparable harm . . . simply by showing that it would be required to pursue a multiplicity of suits to gain relief"). Second, the "goal of a SLAPP suit is not to win on the merits, but rather to discourage the defendant's right to free speech through the prospect of ruinously expensive litigation." Saner, Katelyn E., *Getting SLAPP-ed in Federal Court: Applying State Anti-SLAPP Special Motions to Dismiss in Federal Court After Shady Grove*, 63 Duke Law Journal 781, 781 (2013); *see also, e.g.*, *Blumenthal v. Drudge*, No. 97-1968, 2001 U.S. Dist. LEXIS 1749, *7 (D.D.C. Feb. 13, 2001) ("the purpose of the Anti-SLAPP statute—

to provide for the early dismissal of meritless First Amendment-chilling lawsuits"). It strains credulity to believe that the free speech of ExxonMobil, one of the world's largest corporations, which in the past month has filed no fewer than six lengthy briefs on meritless arguments, is going to be quelled by "ruinously expensive litigation" pursued by a small, D.C.-based non-profit organization acting on behalf of the D.C. public, or that this suit needs to be delayed while ExxonMobil makes that argument.

Defendant-Petitioner ExxonMobil faces no irreparable injury, no ruinous harm, from being called upon to litigate in D.C. Superior Court while by its own election filing motion after motion in the federal courts:

> "[C]ourts within the District of Columbia have regularly found that relatively modest losses are insufficient to meet the standards required for 'irreparable injury.' In the corporate context, for example, 'recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business'." *Wisconsin Gas [v. FERC]*, 758 F.2d. [669,] at 674 [(D.C. Cir. 1985) (per curiam)] (citing *[Wash. Met. Area Transit]*, 559 F.2d at 843 n.2); *see also Varicon Int'l v. Office of Personnel Mgmt.*, 934 F. Supp. 440, 447-48 (D.D.C. 1996) (finding no irreparable harm due to lost contract where movant's revenue would decline by 10%); *Bristol-Myers Squibb Co. v. Shalala, 923* F. Supp. 212, 220-21 (D.D.C. 1996) (finding no irreparable harm where movant would lose $80 million dollars, less than 1% of its total sales); *TGS Tech., Inc. v. United States*, Civ. No. 92-0062, 1992 U.S. Dist. LEXIS 195, at *10 (D.D.C. Jan. 14, 1992) (finding no irreparable harm where lost contract constituted 20% of movant's business).

Lightfoot v. Dist. of Columbia, No. 01-1484, 2006 U.S. Dist. LEXIS 4633, at **27-28 (D.D.C. Jan. 24, 2006). The district court decided this factor correctly, and consistent with precedent:

> Defendant also argues that it will be forced to "waste[]" resources litigating in Superior Court if this case is ultimately found removable. *Id.* at 8. But generally, "[m]ere injuries however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." And even assuming some portion of Defendant's costs litigating the case in Superior Court would not have been spent litigating the case in this court, and those costs are unrecoverable from Plaintiff, Defendant has made no showing that those costs would be sufficiently "great" so as to qualify as irreparable harm.

(4/6/21 Minute Order (citing *Wis. Gas Co.*, 758 F.2d at 674; *McFarland v. Capital One, N.A.*, 2019 U.S. Dist. LEXIS 176885, at *8 (D. Md. Oct. 10, 2019); *Air Transp. Assn of Am., Inc. v. Exp.-Imp. Bank of the U.S.*, 840 F. Supp. 2d 327, 335 (D.D.C. 2012)); *Sandoz, Inc. v. Food & Drug Admin*, 439 F. Supp. 2d 26, 32 (D.D.C. 2006) ("[T]o successfully shoehorn potential economic loss into the irreparable harm requirement, a [movant] must establish that the economic harm is so severe as to cause extreme hardship . . . or threaten [the movant's] very existence.").

C. A Stay Would Harm the Interests of Beyond Pesticides on Behalf of the General Public.

The final two factors are whether a stay will "substantially harm other parties interested in the proceedings" and where the public interest lies. *See Wash. Met. Area Transit*, 559 F.2d at 842-43. Plaintiff-Respondent Beyond Pesticides urges the

Court to consider these two factors together, because in this case, the D.C. public ***are*** the other parties interested in the proceeding. Beyond Pesticides seeks no recovery for itself, only to enjoin conduct directed at D.C. consumers. (Compl. at Prayer.) That conduct is ongoing. Defendant-Petitioner ExxonMobil, citing district-court law from Missouri and Virginia, argues that it is Beyond Pesticides that will be injured if no stay is issued. (MtS 18 ("Beyond Pesticides 'would actually be served by granting a stay,' because they would not 'incur additional expenses from simultaneous litigation before a definitive ruling on appeal is issued'.").) This contention disregards the fact that, with each day wasted awaiting an appeal, the D.C. general public suffers additional harm because Beyond Pesticides is prevented from acting on its behalf. *See, e.g.*, *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005) (holding that balance of harms weighs against granting stay where non-moving party "seeks injunctive relief against ongoing and future harm."). As such, and despite its far lesser resources, Beyond Pesticides freely represents to the Court that, in order to make its substantive case for injunctive relief, it is willing to litigate in two forums for as long as ExxonMobil pursues its appeals.

Defendant-Petitioner ExxonMobil then suggests that the public interest, notwithstanding the ongoing harm alleged to D.C. consumers, is served by a stay that will "eliminate the risk of a waste of resources by the D.C. Superior Court if this Court were later to reverse the remand order." (MtS 18.) This is a rehash of

ExxonMobil's argument regarding litigation costs, and the rehash also fails. ***First***, it is ExxonMobil that is choosing to waste the resources of the courts in order to delay this action. The removal was unfounded. ExxonMobil's "emergency" motion for a temporary stay in the district court was found to be unnecessary, just a cause of more briefing. (3/26/21 Minute Order ("Defendant also argues that at least a temporary stay is warranted so that it can file a more robust motion requesting a stay pending appeal 'no later than April 1.' ECF No. 17 at 1. If Defendant intends to file a more robust motion requesting a stay pending appeal before the remand date, it should simply do so.").) ***Second***, no action the D.C. Superior Court takes will be wasted, as all precedent, invariably, holds that this action belongs in D.C. Superior Court, *see supra*, Part I.A., and that is where the action will ultimately land—regardless of whether ExxonMobil chases nonexistent federal jurisdiction all the way to the Supreme Court, which ExxonMobil told the district court, repeatedly, that it intends to do. (Dist. Ct. Mot. for Stay Sugg. 1, 2, 7, 8, 9, 10.)

The district court gave short shrift to Defendant-Petitioner ExxonMobil's contention that Beyond Pesticides would not be harmed by a stay: "Turning to the remaining two factors, the Court still finds that [Plaintiff-Respondent Beyond Pesticides] would be harmed at least somewhat by even a brief further delay of its case, and the Court perceives no public interest in granting the stay." (4/6/21 Minute Order.) Plaintiff-Respondent Beyond Pesticides asks this Court to do the same.

CONCLUSION

Defendant-Petitioner ExxonMobil's Petition for Permission to Appeal should be denied, just as the identical petitions were denied in *U-Haul*, *General Mills*, and *Monster Beverage*. Regardless of whether the Petition to Appeal is denied, Defendant-Petitioner ExxonMobil's Motion for Emergency Stay of the Remand Order Pending Appeal should be denied, because ExxonMobil's proposed appeal has no reasonable chance of success, and because further delay only cripples Plaintiff-Respondent Beyond Pesticides from pursuing injunctive relief from ongoing conduct.

DATED: April 12, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Tracy D. Rezvani, counsel for respondent Beyond Pesticides and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 27(d)(2)(A), that the foregoing Opposition to the Petition for Permission to Appeal Pursuant to the Class Action Fairness Act of the Remand Order Pending Appeal is proportionately spaced, has a typeface of 14 points or more, and contains 9,828 words.

DATED: April 12, 2021

/s/Tracy D. Rezvani
Tracy D. Rezvani

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I, Tracy D. Rezvani, counsel for respondent Beyond Pesticides and a member of the Bar of this Court, certify, pursuant to D.C. Circuit Rule 28(a)(1), as follows:

(A) Parties and amici. The parties, intervenors, and amici that appeared before the district court and are participating in this appeal are Beyond Pesticides and Exxon Mobil Corporation.

(B) Rulings under review. The ruling for which the underlying permission to appeal is being sought is the district court's memorandum and order of March 22, 2021, remanding the case to state court.

(C) Related cases. The are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

DATED: April 12, 2021

/s/Tracy D. Rezvani
Tracy D. Rezvani

CERTIFICATE OF SERVICE

I, Tracy D. Rezvani, counsel for respondent Beyond Pesticides and a member of the Bar of this Court, certify that, on April 12, 2021, a copy of the attached Opposition to the Petition for Permission to Appeal Pursuant to the Class Action Fairness Act was sent via USPS for delivery overnight and by electronic mail, to the following counsel:

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I further certify that all parties required to be served have been served.

DATED: April 12, 2021

/s/Tracy D. Rezvani
Tracy D. Rezvani

EXHIBIT A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-8006 **September Term, 2013**

1:12-cv-01978-JDB

Filed On: December 16, 2013

Monster Beverage Corporation,

Petitioner

v.

Michael S. Zuckman, On behalf of himself and the General Public of the District of Columbia,

Respondent

BEFORE: Rogers, Tatel, and Srinivasan, Circuit Judges

O R D E R

Upon consideration of the petition for permission to appeal, the response thereto, and the reply, it is

ORDERED that the petition for permission to appeal be denied. The court declines to accept an appeal from the district court's order remanding this case to the Superior Court of the District of Columbia. See 28 U.S.C. § 1453(c)(1) ("[A] court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed...."). The District of Columbia Court of Appeals has not yet addressed whether a "private attorneys general action" brought under the D.C. Consumer Protection Procedures Act must be litigated as a class action under Rule 23. See In re General Mills, No. 10-8001, unpublished order (D.C. Cir. June 25, 2010); In re U-Haul Int'l, Inc., 2009 WL 902414 (D.C. Cir. April 6, 2009).

Per Curiam